Supreme Court of the United States

OCTOBER TERM, 1928.

No. 234

WESTERN & ATLANTIC RAILROAD,
PETITIONER,

versus

MRS. NORA E. HUGHES, AS ADMINISTRATOR OF THE ESTATE OF IRA L. HUGHES, DECEASED, RESPONDENT.

ANSWER OF RESPONDENT TO THE PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF FACTS

The statement of facts in the petition does not do justice to the respondent in that it is incomplete and presents only the defendant's view of the facts.

This case involves only questions of fact. The suit was brought under the Federal Employer's Liability Act, and all the propositions of law arising thereunder were well understood by the court, were fully covered in the court's charge, and were dealt with by the Court of Appeals.

The insistence in the petition for certiorari that only questions of law are involved, and that under the facts there can be no recovery, is, we respectfully submit, unfounded. Four courts have already disagreed with the petitioner in certiorari, to-wit, Judge Ellis, upon the first trial, in the Superior Court; Judge Pomeroy, upon the second trial, in the Superior Court; the Court of Appeals of Georgia, in affirming the judgment upon the record; and the Supreme Court of Georgia, in denying a certiorari to the Court of Appeals of Georgia.

Hughes was a traveling fireman for the railroad. He was on the running board of the engine, inspecting the same, when he was hit by the upright timbers of a bridge, thrown into the river below, and killed. A traveling fireman is not a regular fireman, but is an instructor of other firemen. He rides on any engine, and is not under the jurisdiction of either the engineer or anybody else on the train. He makes his own inspections in his own way (See the evidence of Price, the evidence of Countryman, and the evidence of Ransom, on pp. 133, 122, and 126, respectively, of the Record).

It is the duty of the traveling fireman to see that the mechanism of the engine, so far as firing and steaming is concerned, is all right. He is required to make personal inspection of different parts of the engine, and see how the engines function. This particular engine had on it a new automatic stoker,—that is, a device which fires the engine by machinery. An important feature in firing is to ascertain how the smoke comes out of the stack. If there is too much smoke, the firing is not being properly done. The smoke must come out of the stack round and full; that is, cover all the space in the stack. If it comes out of a portion of the stack, there is a defect in the firing (See the evidence of Ransom, p. 129 of the Record).

The proof, as we shall hereinafter show by reference to the

witnesses and the documents, showed that it was the custom and practice of traveling firemen to go out on the engine while it was in motion, observe the smoke and the stack, and observe all the parts of the machinery about the front of the engine which are visible, to see that they were functioning properly. This was the main and most important duty of the traveling fireman. Nobody had ever laid down any rule as to when he should go out on the running board, or how he should do it. We will hereinafter show that the claim by one of the defendant's witnesses that an oral instruction was given the decedent not to go upon the running board is not corroborated by any other facts in the Record, is shown by engineers of long standing on the railroad to have never been heard of, and to be an incredible piece of testimony which the jury were well warranted in not believing. Besides, such an act might be contributory negligence, but would not bar a recovery if the negligence of the defendant contributed. It will not do to claim, as the defendant did in substance, that the doctrine of assumption of the risk covers the same ground as the doctrine of contributory negligence, on part of the injured person. Each works in a separate orbit. As a rule, the doctrine of assumption of the risk appertains to fixed structures or conditions, while contributory negligence pertains to the manner, usually, in which the employe does his work.

It was the duty of the traveling fireman, under the printed instructions and reports handed him by the defendant, and which he was compelled to fill out upon making each trip, to examine and report upon the condition of numbers of things about the engine. A large number of these things could only be properly reported upon by going to the front of the engine while it was in motion, as we will hereinafter show. It was not necessary that there should be some defect in the engine which the traveling fireman should inspect. It was his standing duty on each trip to report on a number of different things, and

in order to do so, he must get out and go over the running board and around the engine when it was in motion. It was for the traveling fireman to select his own time to do this job. Had this track been in good condition, and this engine not been rocking and swaying unduly, there was no danger whatever in going on the running board as the engine passed through this bridge. There was over two feet clearance between the widest part of the engine and the side timbers of the bridge.

The engineer, Price, denied that there was any trouble with his engine on this occasion, but the plaintiff and Mrs. Josie Hichols, on pp. 135 and 136 of the Record, testified that there had been a knock in the front part of this engine, so the engineer Price had told them immediately after the occurrence. This, however, is not necessary, in any sense, to justify the decedent in going out upon the engine in his duty of inspection.

The witness, Holcomb, saw the decedent at the front end of the engine as it approached the bridge, looking down at something (See Holcomb's evidence, Record p. 104).

The witness, McHan, who was on the engine, saw the decedent when he was watching something at the front end of the engine (Record p. 123).

The witness, Kemp, also testified, as will be hereinafter shown, that he was watching the smoke of the engine (See the Record, p. 58).

The engineer testified that the smoke, as it came out of the stack, could not be seen from the cab of the engine (See the Record, p. 135).

Hughes was seen by the engineer to have viewed the engine on his side from the right hand running board (See the evi-

dence of Price, Record p. 134). He went around the running board, descended steps at the front end of the engine, and came around on the fireman's side, where the fireman and the brakeman saw him (See the evidence of Kemp, Record pp. 58 and 59, and McHan, Record p. 123).

The last that was seen of him was by Kemp and McHan, who saw him approaching the caboose, and who saw him about the time the engine entered the bridge.

Hughes was last seen upon the running board. It was thought he was preparing to climb into the caboose by the gangway. It is manifest, therefore, that he was either pushed off the running board, or that he was undertaking to get around the cab by the way provided for entering and leaving the caboose from the running board. An examination of the picture of the engine in the Record will show a place where hands can catch on top of cab and a foothold by the side of the engine cab which can be used for this purpose. The three counts cover every way in which he could possibly have been killed. Hughes' body was fished out of the river at a place near the entrance to the bridge (See the evidence of Parker on p. 83 of the Record).

Hair and blood were found on the post on the left hand side of the bridge at about thirteen to fifteen feet from the floor (See the evidence of Holcomb, Record p. 106, and Headrick, Record p. 78).

There was a deep cut in the back of Hughes' head when his body was found (See the evidence of Headrick, Record p. 78).

The clearance between the side of the caboose of the engine and the upright timbers of the bridge was over two feet (See the evidence of Holcomb as to the width of the bridge being fourteen feet, two and one-fourth inches, Record p. 106, and

see the evidence of Ransom as to the widest part of the engine at the cab being ten feet two inches, Record p. 126). Engineer Price said it is about three feet clearance (Record p. 135).

It is manifest, therefore, that Hughes, either standing on the running board, or walking around the cab, would have had plenty of space in which to clear the timbers of the bridge, if the engine should be running smoothly.

But the cause of Hughes' head coming in contact with the upright timber of the bridge, as the physical evidence showed, is not hard to ascertain.

About thirty or forty feet from the north end of this bridge was a dirt road which crossed the track, in which the water was allowed to accumulate, and at which there was a bad low place or joint in the track. A little closer to the bridge was another bad low place or joint. Trains which were observed during the same week approaching this place were seen to give way when these low joints were reached, and begin a severe rocking or swaying motion. The trains were not observed to rock perceptibly before striking these low joints. The various witnesses (and hereinafter we will refer to their names and the pages of the Record on which their evidence appears) say that this low place had existed some weeks before the accident and death of Hughes, and also that it was present on Saturday after Wednesday of the week on which Hughes was killed, and photographs even taken over two years later showed bad places in the track at these points.

The witnesses who observed trains go over this place at about the time of this occurrence noticed that the engines, which were running without rocking until reaching these low places, began to rock and sway severely after these low joints were struck. The distance that the track gave way was estimated at

all the way from two or three to four or five inches. The rocking motion of the engine was seen to continue until the engine reached the bridge, and the witnesses vary in their testimony as to how close the side of the cab came to the bridge, the witnesses making it from about six to eight inches.

These witnesses, it is true, were not expert railroad men, and were laymen, but they saw these facts, they observed these occurrences, and they could testify to physical facts as well as anybody else.

The railroad makes the contention that all tracks give a little bit, and that it is nothing unusual for tracks to give some, and that only experts could tell the bearing of a giving way of a track upon the conduct of an engine in operation. We submit that these witnesses not only told how far the track gave way as the train went over it, but also observed its physical effect on the engine, and saw how near the side of the engine came to the bridge, which could well account for carrying the body of a man who was on the engine so close to the upright pieces of the bridge that his head would be stricken.

As to whether giving way of a track as much as was testified to by the plaintiff's witnesses would cause an engine to rock unduly and severely, the master mechanic of the defendant (as will be hereinafter shown by giving his name and the page of the Record on which it appears) testified that if the track gave way as much as those witnesses testified to, there would even be danger of dèrailing an engine, and several of the witnesses, notably Finney, testified as to the rocking and swaying effect that low joints in a track have upon an engine. We will show all this hereafter in the brief.

Hughes knew nothing about this condition of the track. He was a traveling fireman, and it was his duty only to look after

the condition of the engine. He had nothing to do with the track. He was not even responsible for the running of the engine, like the engineer is. There might be some reason for saying that the engineer must know the rough places in the track, as he controls the speed of the engine, but if a fireman or a traveling fireman should find it out, it would be by some occurrence outside of what his duties require. There is no reason why he should know it, or even notice it.

There was a part of the declaration in this case which alleged negligence in constructing the bridge so close to the rail, and not giving sufficient clearance for trains. This part of the case was eliminated in the charge of the court. The judge below charged the jury that the decedent assumed all the risk which arose from the nearness of the upright timbers of the bridge to the side of the engine. He left it to the jury, however, as a question of fact, to decide, first, whether the defendant was negligent in leaving its track in defective condition at this point, and, secondly, whether this negligence was the cause of Hughes' death. He charged the jury fully as to assumption of the risk as to all phases of the case, using practically the language which has been used by this court in several cases.

ONE NEW TRIAL WAS GRANTED BY THE TRIAL COURT ON GROUND THAT THE FIRST VERDICT OF $17,500 WAS EXCESSIVE; ON SECOND TRIAL, A VERDICT FOR $10,000 WAS RENDERED, WHICH WAS SATISFACTORY TO THE TRIAL COURT, AND THIS IS THE JUDGMENT WHICH WAS AFFIRMED BY COURT OF APPEALS.

As stated in the heading hereto, on the first verdict a new trial was granted by Judge Ellis, one of the judges of the

Superior Courts of the Atlanta Circuit, who tried the case, and his opinion appears on pages 46, 47, 48 and 49 of the Record.

Judge Ellis granted the new trial, as will appear from his opinion, mainly because he considered the amount too large, and it was his opinion that a larger reduction should have been made because of the contributory negligence of the decedent, Judge Ellis believing that the decedent was guilty of contributory negligence which should have reduced the recovery. In his opinion, Judge Ellis used the following language (Record p. 48):

> "My opinion is there will always be a finding for the plaintiff of some amount in this case. I am not deciding whether there ought to be or ought not to be, but what has greatly disturbed me is, whether the amount of this verdict can be justified, under the circumstances, considering the doctrine of contributory negligence."

When the second trial occurred in Fulton Superior Court, a different judge presided, Judge E. E. Pomeroy. It does not appear from this Record what the evidence was on the first trial. Upon the motion for new trial being filed when the second verdict was rendered, the same was overruled by Judge Pomeroy, as appears from the Record on p. 45.

REPLY TO POSITION IN CERTIORARI THAT THERE WAS UNCERTAINTY AS TO THE METHOD BY WHICH DECEDENT WAS KILLED AND THAT SUIT WAS BROUGHT IN THREE COUNTS.

The petition for certiorari calls attention to the fact that the suit was brought in three counts: one count alleging that while Hughes was on the running board, that due to the excessive

rocking of the engine and the dangerous proximity of the sides of the bridge, his head came in contact with the upright timbers of the bridge; the second count alleging that he had left the running board, and, while engaged in passing around the cab (there being a place provided for that purpose) he was knocked off by the upright timbers of the bridge; the third count alleging that, while upon the running board, he was unbalanced by the rocking motion of the locomotive and thrown off. These various counts appear on pages 6, 7, 13, 18 and 19 of the Record.

It is the practice in Georgia to allow a petition to contain several distinct counts referring to the same transaction and differing from each other in substantial particulars as to the details of the transaction, and the case may go to the jury upon all of the counts. See Gainesville &c. Ry. vs. Austin, 122 Ga. 823.

The declaration also alleged, as applicable to the entire transaction, that before reaching the bridge in question, the track passed over a dirt road; that the defendant negligently allowed a low place to remain in the track at this point, to-wit: a place which was not properly ballasted or supported underneath, which was a low joint and which allowed the engine to give unnecessarily and unduly, to-wit: four or five inches, and that upon the engine striking the said low place it was caused to tilt unduly, severely and dangerously, and that a few feet further on, to-wit: about ten feet from the bridge, it struck another similar low joint, which added to the rocking motion of the engine and caused the top part of the engine to lean excessively on each side with each swing of the engine, and caused the engine to rock from ten to twelve inches further than it would have swayed had the track been in reasonably safe condition; that on account of the rocking motion, and on account of the dangerous proximity of the side structure of the bridge, the decedent's head was thrown in contact with the upright

timbers of the bridge (See Record p. 7). This allegation as to the defective condition of the track is carried into all of the counts.

As to the claim that there was uncertainty as to how the decedent was killed,—there was, under the plaintiff's evidence, abundant tesimony to find that the decedent was out upon the running board of the engine inspecting the working parts of the front thereof, as well as the emission of smoke from the stack, there being a new stoker on the engine, and that he could only do this from a place on the front of the engine and while it was in motion, and that he was returning to the caboose of the engine on the fireman's side at the time he was struck.

We do not understand that, because a case is dependent upon circumstantial evidence—whether civil or criminal—the jury is not at liberty to draw all legitimate inferences. The man on the engine, whose testimony we have quoted hereinbefore, saw Hughes in the act of falling by the cab.

We have already quoted the testimony of Kemp. The witness McHan testified that he was on the fireman's side of the engine, he being a brakeman and riding on the engine; that he saw Hughes coming around the front of the engine on the fireman's side; that he was stooping over looking at the cylinders; that when he next saw him, he was coming up the little steps on the running board on the fireman's side, facing the witness; that when witness last saw him, before he fell, he was about where the pumps are on the engine; that as the witness was looking back from his place on the cab, he felt something brush his goggles; some part of Hughes' body hit the witness' shoulder, and he saw Hughes go down; he saw his body go down the bridge like that (See Record pp. 123 and 124).

These witnesses saw Hughes on the running board approach-

ing the bridge. They were paying no very close attention to him. They did see his body fall by the side of the cab, so close as to brush the witness McHan's goggles. It was inevitable that Hughes was hit either from his stand on the running board, or as he was getting around the side of the caboose to get into the engine again. If he had been hit on the running board, the motion of the engine would have carried the engine past his body as it was falling, and might have made it seem to those in the engine as if he fell from the cab. He certainly had not gotten further than the running board or the outside of the cab. That he was hit by the upright post of the bridge was shown by the wound on his head and by the hair and blood on the upright post of the bridge thirteen or fourteen feet above the floor, as was testified to by Headrick and Holcomb, hereinbefore quoted. His body fell into the river and was fished out of the river.

There was clearance for his body, had the engine been running smoothly. The space between the side of the caboose, which is the extreme width of the engine, and the inside of the bridge post was over two feet. Unquestionably, this would have cleared him had he been on the running board, as against any normal movement of the engine. It would have cleared him if he was going around the cab to get in the gangway or window, but, with the engine rocking as it did from these low places in the track, and swaying as much as ten inches or a foot from side to side, it was certainly a reasonable inference that this was what caused his head to come in contact with the timber of the bridge and kill him.

The jury system was devised to solve just such questions as this. That the case is made out by circumstantial evidence does not make it a case of conjecture.

As to the witness Kemp seeing the body of Hughes fall by

the gangway, Kemp testified that of course the motion of the engine would naturally carry him back some (Record p. 59). Kemp saw Hughes as he was in the act of falling (Record p. 59).

There was a wound on the back of Hughes' head, found after his body was fished out of the river (Record p. 83). Hughes' body fell into the river below, just as the train entered the bridge (Record p. 83).

On the left hand front upright part of the bridge (on the fireman's side) hair and blood were found. It was at least twelve feet above the ground (Record p. 83).

The witness Holcomb also found blood and hair on the batter posts thirteen feet and six inches above the floor of the bridge (Record pp. 104 and 105).

We also refer to the various facts stated in the Statement of Facts herein, such as the evidence of Parker on p. 83 of the Record that Hughes' body was fished out of the river, and the evidence of McHan that when Hughes fell his body brushed by Mr. McHan's goggles (Record p. 124).

TRIAL JUDGE ELIMINATED CHARGE IN DECLARATION THAT NEGLIGENCE IN BUILDING UPRIGHT TIMBERS OF BRIDGE TOO CLOSE TO TRACK WAS CAUSE OF HUGHES' DEATH; JUDGE CHARGED JURY THAT HUGHES ASSUMED RISK AS TO CLOSE PROXIMITY OF BRIDGE TIMBERS TO TRAINS; JUDGE CHARGED JURY GENERAL DOCTRINE OF ASSUMPTION OF RISK, AND LEFT TO JURY QUESTION AS TO WHETHER HUGHES ASSUMED RISK OF DEFECTIVE

CONDITION OF TRACK; JUDGE SUBMITTED TO JURY THE CASE ON PROPOSITIONS, FIRST, WHETHER TRACK WAS DEFECTIVE OWING TO NEGLIGENCE OF DEFENDANT; SECOND, WHETHER SUCH NEGLIGENCE WAS CAUSE OF HUGHES' DEATH; THIRD, WHETHER HUGHES WAS GUILTY OF CONTRIBUTORY NEGLIGENCE IN BEING UPON RUNNING BOARD, WHICH WOULD REDUCE DAMAGES; AND FOURTH, JUDGE CHARGED ELABORATELY ON ASSUMPTION OF RISK IN SUBSTANTIALLY LANGUAGE LAID DOWN BY THIS COURT, LEAVING IT TO JURY AS TO WHETHER HIS ASSUMPTION OF THE RISK APPLIED TO THE DEFECTIVE CONDITION OF THE TRACK.

That portion of the petition which alleged that the side of the bridge was in dangerous proximity to the sides of the engine was eliminated from the jury's consideration by the charge of the court, the court having charged the jury as follows, to-wit (See Record p. 147):

> "The petition further alleges certain negligence with reference to the construction of the bridge, but the court instructs you not to consider those specific allegations of negligence with reference to the construction of the bridge. Those allegations are eliminated from your consideration. That is, allegations of negligence such as relate to the permanent structure of that bridge."

The court confined the jury to the specifications relating to the condition of the track (See that portion of the court's charge on pages 146 and 147).

As to this condition of the track, the court charged the jury as follows (Record p. 155):

> "While the bridge alone would constitute an assumed risk, as far as the decedent is concerned, this would not prevent a recovery if the defendant was negligent in respect to the condition of its track and if that condition of the track was the cause, by the rocking of the engine, if it rocked, of the decedent being caused to come in contact with the bridge, or if that negligent condition of the track, if it was in that condition, caused the decedent to be thrown from the running board of the engine and killed."

We thus see that the court below eliminated the bridge alone from the case as a claim of liability. This bridge, according to the evidence, cleared this locomotive, when the locomotive was in a normal condition and at rest, twenty-six inches (See Record pp. 86, 88, 193).

It will thus be seen that had there been no unusual rocking of the engine, the decedent's position on the running board, or even getting around the cab, would have been safe.

In Georgia, a claim in the pleadings which is untenable may be eliminated in the charge of the court, and this does so as effectively as a formal order striking the part objected to from the pleadings. The charge of the court therefore eliminated any claim of liability based solely and alone upon the closeness of the bridge to the track. Upon that subject, the Court of Appeals ruled as follows (Record p. 165):

> "2. Where upon the trial of such a suit the trial judge instructed the jury that the plaintiff's husband, who was a servant of the defendant, had, in going upon the running-board of the engine in the discharge of his duty, assumed the risk incident to the existence of the bridge in proximity to the defendant's track and its passing locomotive, and withdrew from the jury any consideration as to negli-

gence upon the part of the defendant in respect to the maintenance of the bridge, the overruling of the defendant's demurrers to the petition, objecting to, as insufficient, the allegations of negligence upon the part of the defendant as respects the maintenance of the bridge in close proximity to the defendant's track and its passing locomotive, was harmless."

Thus, the Court of Appeals confined the consideration of the the case to the condition of the track.

PETITION FOR CERTIORARI CLAIMS ON PAGES 4 AND 5 THAT THERE WAS NO UNUSUAL ROCKING OR LEANING OF THE ENGINE AT THE TIME OF HUGHES' INJURY, AND QUOTES WITNESS KEMP AS SAYING ENGINE WAS THEN RUNNING ALL RIGHT; TESTIMONY OF SEVERAL WITNESSES SHOWED THAT ENGINE GOING OVER THIS PLACE AT ABOUT THIS TIME, ON ACCOUNT OF CONDITION OF TRACK, SWAYED SEVERELY AS BRIDGE WAS ENTERED, MAKING WHAT WOULD OTHERWISE BE GOOD CLEARANCE DANGEROUS; THAT THE TRACK WAS IN DEFECTIVE CONDITION AND THAT ENGINES RUNNING SMOOTHLY UNTIL THE LOW JOINTS WERE REACHED, BEGAN TO ROCK AT THAT PLACE AND ROCKED AND SWAYED UNTIL THE BRIDGE WAS ENTERED.

Much stress seems to be laid on the evidence of the fireman Kemp in the petition for certiorari.

It will be seen from the Record, p. 57, that Kemp was only examined by deposition by the respondent. Kemp was the fire-

man on the engine, and the crew had, of necessity, to be examined in order to show the circumstances attending Hughes' falling off the engine. In no fair sense could Kemp be called the plaintiff's witness. He was still in the defendant's employment at the time of the trial.

Mrs. Hughes also testified on p. 52 of the Record that, during the week that her husband was killed, she had observed two trains pass over the track just before entering the bridge; that the low places in the track started the engine to rocking; that she had not observed it rocking before reaching the low places; that the track gave down four to five inches at the low places; that as it approached the bridge, the engine was rocking and the engine came within six or eight inches of the bridge.

That the track was in defective condition, and that it caused the engine to rock unduly, we will now proceed to demonstrate.

Had the track been in good condition and the rocking of the engine been only moderate, the bridge would have easily cleared the decedent, for there was over two feet of clearance even from the outside of the cab. With the deceased standing on the running board, he would have been over two feet from the sides of the bridge, and with the decedent even climbing around the caboose, he would have had two feet space in which to get around the caboose, which would have been ample had the engine been operating normally.

But with the severe rocking of a structure fourteen feet high, it might easily be seen that the top parts would be brought in close contact with the side of the bridge, which was a danger not to be apprehended by the decedent, and which resulted from the rocking motion of the engine, the rocking motion being caused by the rough places in the track.

Amos Shepherd testified that he had noticed trains running over the track at this crossing for three weeks before the accident (the witness having seen the train enter the bridge); that when trains would go over the track at the low point, water would slosh over the ties; that he didn't know whether there was any joint in the rail at that point; that he just noticed when the ties went down; that he noticed the ties and track went down as trains went over it; that he had noticed this several times when he would be waiting for the train to pass; that he had seen the ties give way when they made that crossing; they would go down; that he did not know how far the track went down, but it looked to him like it went down that far, the length of his finger which may be three inches, something like that; that he had noticed that several times in wet weather when he would be there before the accident happened (Record p. 74).

John Headrick testified that in the week of the death of Hughes, and on the Saturday after Hughes was killed on Wednesday, he went to the place; that he climbed up the side of the bridge and saw hair on the posts on the left side coming south, fourteen or fifteen feet up over; that there is a grade crossing about thirty-five feet from the bridge; that he noticed trains pass over that crossing on that occasion. When the engine passed over the crossing, he noticed a low place in the track and also some slush that went from under the ties, the water slushed out as the train went over, and the track gave down, he would say some three or four inches at that point; that the engine rocked to the right and then to the left; that it was rocking considerably when it hit the bridge; that there were two of those bad places, and then there was one up near the bridge; as the engine entered the bridge, it had a rocking motion; that in the witness' judgment, the engine came in about eight inches of the upright pieces of the bridge (Record p. 78).

Mrs. John Headrick testified that she was at this place on the week of the tragedy; that she saw two trains pass the place; that the rails went down some three or four inches at the low places; that there was a low place on each side of the track; that the engine was rocking when it entered the bridge, and that it appeared to her that the cab where the engineer and fireman sat came within seven or eight inches of the side pieces of the bridge, pretty close to the bridge; that she was on one side of the track when one train went through and on the other side when the other train went through (Record p. 79).

J. C. Headrick testified that he was present on this occasion (Record p. 80), and that he thought the rails went down some four or five inches, and that the engine rocked back and forth, and that it looked to him like the engine came within a foot of the upright pieces of the bridge.

Photographs were taken of the bridge over two years later (See the testimony of Millard Headrick, Record p. 81).

Adams, a photographer, took the photographs (Record p. 63).

These photographs were introduced in evidence, and they show conclusively that the low place had been allowed to remain in the track until October, 1925. We call the court's attention to the photograph on p. 175 of the Record as showing how the ballast was washed from under the ties and how the ties were exposed by the wash of the water coming down from the hill on the west side of the track. The photograph on p. 176 shows the same thing. Especially does the photograph on p. 180 show the extent to which the ballast had been washed out from under the tracks beginning at a joint just at this crossing. The photograph on p. 181 shows substantially the same thing.

We say the plaintiff's evidence established conclusively, first, that the defendant was negligent in respect to the upkeep of its track just north of this bridge. We say, secondly, that it was conclusively proved by witnesses, who saw trains pass over the place practically at the time of the accident, that the effect of this defective track was to cause an engine to rock with great and unusual severity. Third, we say the evidence abundantly established that the decedent, in the performance of his duties, should have inspected all parts of this engine while in operation, and that was the best time to inspect it, and it was his duty to get around that running board and watch the smoke from the stack to see how the new automatic stoker was operating. It was his duty to get around in front of the engine, see the cylinder, observe the condition of the cylinder packing, observe the front end for air leaks, and come around on the fireman's side and take in the condition on that side. Fourth, we say that it is not a question of assuming the risk from the bridge, but a question of whether the decedent assumed any risk from a defective track which is not shown to have been brought to his knowledge, or as to which he is not charged with knowledge, under practically all the decisions. Fifth, we say that, so far as the bridge alone is concerned, the two feet clearance would have amply sufficed to have enabled the decedent to pass through, and, so far as the bridge was concerned, he was not taking any unusual risk in being out on the running board. Sixth, we say that the overwhelming circumstances of the case show that it was the excessive rocking of this engine which caused the death of the decedent, either (a) while he was upon the running board by throwing his head in contact with the bridge; or (b), while he was on the running board by causing him, by the rocking and swaying of the engine, to become unbalanced and thrown from the engine; or (c) while he was undertaking to get around the caboose, by rocking so severely and unusually as to cause his head to come in contact with the

upright timbers, when, otherwise, there would have been clearance, to-wit, of over two feet.

At the outset of the discussion of the facts, we will eliminate the averment in the petition that the bridge timbers were too close to the track. The judge eliminated this by his charge that the decedent assumed the risk of this fixed structure and the risk of injury from its timbers being too close to trains.

Of course, the bridge remains in the case as a condition of the casualty; that is, the bridge becomes important because of the previous negligence in having a defective track, causing the engine to come too close to the bridge. We will assume that the bridge alone was all right, but the bridge became dangerous because of the negligence in having a defective track, which caused the engine to rock.

As to defendant's witnesses who did not notice the defective track at this point, we say, first, such evidence was only negative; second, the witnesses were employes and interested, and their credibility was for the jury; third, the most that can be said for the railroad is that these witnesses were in conflict with plaintiff's witnesses as to the condition of the track, and this was a jury issue.

DUTIES OF HUGHES REQUIRED HIM TO INSPECT ENGINE FROM RUNNING BOARD AND FRONT OF ENGINE WHILE IT WAS IN MOTION; WAS REQUIRED TO MAKE PRINTED REPORTS ON EACH TRIP AS TO FACTS WHICH COULD ONLY BE ASCERTAINED WHILE INSPECTING THE ENGINE IN MOTION; HUGHES WAS GIVEN NO PRINTED OR WRITTEN INSTRUCTIONS AS TO HOW TO PERFORM HIS DUTIES OTHER THAN THESE

REPORTS HE WAS REQUIRED TO FILL IN; HUGHES DID HIS WORK INDEPENDENTLY ON ENGINE AND WAS IN AUTHORITY OVER FIREMAN AND WAS NOT UNDER THE ENGINEER; CUSTOM AND PRACTICE HAD BEEN FOR TRAVELING FIREMEN TO INSPECT ENGINES WHILE IN MOTION.

This particular engine had installed on it a new kind of mechanical stoker, and the deceased was watching its operations and giving the fireman instructions (See Kemp's evidence, Record p. 58). If the smoke is black and thick, the engine is burning too much coal, and the smoke stack is one of the points which needs to be watched to see whether the engine is being fired properly (See Kemp's evidence, Record p. 58).

Hughes, in going out upon the running board, stood close to the stack and watched the smoke, and his face was turned in the direction of the smoke stack, according to Kemp (Record p. 58).

The duties of Hughes as traveling fireman were not defined by any written or printed rule. There is nothing in any written or printed rules either about employes going upon the running board or about the duties of a traveling fireman (See Record pp. 129 and 130, in examination of Ransom, master mechanic).

The only written rule ever seen about the running board was issued on May 2, 1923, addressed to engineers and firemen, according to Ransom (Record p. 130). This was after Hughes was killed.

Engineer Price testified that he saw Hughes go out upon the running board on his (Price's) side, and that when he saw

Hughes, he was looking at the smoke and looking at the machinery and looking up and all around (Record p. 134). This witness had had traveling firemen, however, to go out on the running board of his engine. They had gone out on a number of occasions (Record pp. 134 and 135).

From the cab of the engine, witness could not see the top of the smoke stack, and that is hidden from him "while in the cab by the sand box. The same thing is true of the fireman's side" (See Record p. 135).

Kemp testified that he had seen traveling firemen go out on the front end of the engine both before that time and since, and that he himself had gone on the running board while the engine was in motion to rake the sand over (Record p. 59).

The witness Kemp testified that employes frequently went out on the running board (Record p. 59).

So did the witness Price (Record p. 134).

So did the witness Finney (Record p. 65).

The witness Emmett Finney was an engineer on this road at the time of Hughes' death, and had been so for over twenty years (See the Record of Finney's testimony, beginning on p. 65).

On p. 65, he testified as follows:

> "As to how often I would have a traveling fireman on my engine, they did not have any regular time to go with a certain engineer. Sometimes I would have one twice a week, and sometimes once a month. As to what things are there at the front of the engine that a traveling fireman can inspect; things about an engine that need inspection. They can see better on the running board all the machinery, the

working part of the machinery and if there is any leak at the front end, they can see that better than from the cab of the engine."

Finney testified that the front door of the engine is too small for a fireman to get out; that in large engines the traveling fireman had to go around the caboose. There is a step on the side of the caboose and a handhold at the top provided for them to get around by. He further testified on p. 66:

"They can see the machinery far better, right up over it; here is where the machinery works, and they can see the machinery far better here than they can from the cab of the engine. The eccentrics are up there, and the steam chest, and the cylinders, and I have went out myself, and the regular fireman. The sand pipe gets stopped up, and you have to knock it open, and you have to get, sometimes, on the top of the hand rail, to rake the sand down; and then you can go around here and see the front end of the engine here, if it is not tight. It is a very large door; if it is leaking very badly, if the smoke comes out in volumes, you can see it from the cab, and when it leaks badly you can put your hand over it and feel the suction, and you could not do that from the cab. Those rods that you see on those large driving wheels, one is the main rod, and the other is the side rod. If they are knocking very badly, you can hear them from the cab. You cannot see the rods from the cab, but right up over the running-board, you can see them knock, even if they are not knocking so badly. If there is some play in the rods there—enough to enable them to thump, you can see that from the running board but you cannot from the cab. At the front end of the engine you can hear the blow from the cylinder packers. You can tell by the way the engine exhausts, how the smoke comes out, whether the cylinders are in good shape. This (illustrating) is the front door of the engine. Now this door is connected with bolts, and it tightens up. It is supposed to be absolutely air tight. If it is not, it gets into the fire box and gets the fire dirty, so it will not

steam. There is a place in the front provided for a man to get around there. He gets on what they call the beam of the pilot, and goes around on the other side. There is a way provided for him to get out clear from the cab to the running board and around the front, and on the other side back into the cab. It has got hand holds all in front there. There are steps going down from the running board to the cross-bar. If an engine is standing still, as to whether you could or not tell whether the rods are working right or not, a man can go out on an engine. When I oil my engine, if there is any bad defect in the rods, I could notice it, because the braces would stand a little bit apart. They are supposed to be jammed close up together. You could tell that if there was a large defect, but, when the engine is running, you could hear it knocking, and you could not hear nothing standing still. The best way to tell the defect is when the engine is in operation, of course. An engine cannot stand still on the track and run its drivers around unless it is jacked up."

In Finney's testimony on page 72, he testified as follows:

"As to any rule or regulation, or bulletin, order or requirement against traveling engineers and traveling firemen going out on the running board when the engine was in motion; I never seen any bulletin about that while I was there. I never heard of it; they all went out when they wanted to, with me, except on one or two occasions."

There was printed evidence as to what the duties of a traveling fireman were. That printed evidence was contained in the reports which this railway required traveling firemen to make at the end of each trip, and on every trip Hughes had taken in his short career as traveling fireman he had filled in one of these reports, and these reports appear on pages 136, 137 and 138 of the Record. These reports required the traveling fireman, among other things, to report on the condition of the throttle, the reverse lever, the braking, the boiler feeding, the lubrication, the gauge cock, cylinder packing, the valves, the

rods, the boxes, the flues, the arches, the stoker, the fire box, the fire door, the grate shaker, the front end air leaks, the quality of coal (Record pp. 136, 137).

From the testimony of engineer Finney, the traveling fireman could not possibly have made a conscientious and true report on all these conditions without going to the front end of the engine while it was in motion and inspecting conditions there (Record pp. 66 and 67).

On page 66, as to making reports on the rods of the engine, Finney testified that the rods could not be seen from the cab, but right up there over the running board you can see them knock, and if there is play in the rods it can be seen from that point. He testified that at the front end of the engine you can hear the blow from the cylinder packing (Record p. 66); that you can tell by the way the engine exhausts and how the smoke comes out whether the cylinders are in good shape (Record p. 66); that the front door of the engine, which is at the front end of the boiler is connected with bolts and is supposed to be air tight, and if it is not the engine will not steam right, and there is a place in the front provided for a man to get around there (Record p. 66).

There are steps going down from the running board to the cross bar by which a man can go across from one side of the engine to the other (Record pp. 66 and 67).

If an engine is standing still, you can not tell whether the rods are working right (Record p. 67). The best way to tell the defect is when the engine is in operation (Record p. 67).

Taking up the questions the traveling fireman was required to answer in his printed report, Finney testified that if the cylinder packing is blowing very much, you can hear it from

the cab, but if it is not blowing loud enough to hear it from the cab, a man standing over the cylinder could hear it (Record p. 67). You can best see the smoke coming out of the smoke stack right near the front of the engine (Record p. 68).

Ransom testified that if an engine was steaming well, the smoke should come out full from the top of the smoke stack and not from a portion of it only (Record p. 129).

Price, the engineer, testified that you could not see the top of the smoke stack from the cab at all (See Price's testimony, Record p. 135).

Finney testified that if the rods are slightly out of condition, you could hear them knocking and could be right over them on the running board (Record p. 68).

To see the driving boxes, right at them is the best place (Record p. 68).

There is no way in the world to tell about a cylinder packing or a valve blow unless the engine is working (Record p. 68).

As to front end air leaks, you can not tell if there is a small leak unless one gets out to the front, and the best way is to put your hand there for suction, and there is a leak that does not emit smoke (Record p. 68).

There is no way to find out about that suction if the engine is standing still (Record p. 68).

ONLY PRINTED BULLETIN IN EXISTENCE FORBIDDING ENGINEERS AND FIREMEN TO GO UPON THE RUNNING BOARD WHILE ENGINE IS IN MOTION WAS ISSUED AFTER HUGHES' DEATH; TESTIMONY OF RANSOM,

MASTER MECHANIC, THAT A SIMILAR BULLETIN HAD BEEN PRINTED AND PUT ON BOARD IN 1908 COULD NOT AFFECT HUGHES, BECAUSE IT REMAINED ON BOARD ONLY A FEW MONTHS AND HUGHES WAS NOT EMPLOYED UNTIL 1910; RANSOM'S TESTIMONY INCREDIBLE AND CONTRADICTED BY CIRCUMSTANCES IN HIS CLAIM THAT HE VERBALLY TOLD HUGHES NOT TO GO UPON RUNNING BOARD OF ENGINE IN MOTION. JURY WERE JUSTIFIED IN DISCREDITING THIS CLAIM. NOTHING IN RULE BOOK FIXING OR DEFINING DUTIES OF TRAVELING FIREMAN. LAW IS THAT RULES AND REGULATIONS OF EMPLOYER MUST BE COMMUNICATED CLEARLY TO EMPLOYE.

There was no written rule forbidding firemen and engineers from going upon the running board. The only printed bulletin order was issued after the death of Hughes (See the testimony of Ransom on pp. 128, 130). The only written rule ever seen about the running board was issued May 2, 1923, and was addressed to engineers and firemen (See testimony of Ransom, Record p. 130). As just stated, this was after Hughes had been killed in April.

Ransom claimed that he had seen a printed bulletin order forbidding firemen and engineers from going upon the running board previous to this, but could not repeat its words as it had been so long ago, but his recollection was that it was in substance the same as the one of May, 1923, and that it was issued about 1908 (See Record p. 130).

The plaintiff's contention was that this testimony of Ransom was not true; that no record appeared anywhere of this alleged

bulletin order of 1908; that Hughes was dead, and that the circumstances disproved Ransom's testimony.

Besides, a traveling fireman did not come under the description of a general fireman, and the bulletin order was addressed to engineers and firemen (Record p. 126).

Ransom's evidence further was that the bulletin order of 1908 was torn up (Record p. 130). Hughes was not employed until 1910 (Record p. 126).

Ransom only claimed that the order of 1908 stayed on the bulletin board a few months. He did not claim that any of these orders stayed on the board permanently or were among the permanent rules of the company (Record pp. 128 and 130).

It is familiar law that rules and regulations of the master, to be binding upon the employe, must be communicated to him in some clear and reasonable way.

Ransom also testified that he verbally told Hughes when he was promoted to the position of traveling fireman not to go on the running board of an engine in motion (Record p. 127).

Plaintiff below contested the truth of this statement. Hughes was dead and could not deny it. Is it not strange that this is the only rule which Ransom remembered telling Hughes about out of all the numerous things which are dangerous in railroading? Is it not strange that Ransom, after this tragedy, can only remember one warning which he gave Hughes upon his employment, and that was the one that fitted the case after this accident and there was no special reason to call Hughes' attention to it as he had never gotten in any trouble about being on the running board?

Did not the employer owe the duty to the employe, if there was any such instruction or rule, to put it in some tangible shape where there could be no dispute about it?

As to all of this testimony of Ransom about the previous bulletin order and the instruction to Hughes, it is not corroborated, and the testimony of the numerous employes was that the traveling firemen went upon the running board on their various trips while the engine was in motion, inspecting the parts of it, and we have hereinbefore shown that the only way in which this traveling fireman could perform his duty was to get upon the running board and observe the parts while in motion, and if there is a conflict between two rules, the uniform rule is that the construction must be against the master. As to the practice of traveling firemen, see the testimony of Kemp, p. 59, Price, p. 134 and Finney, p. 65.

The witness Finney, on p. 72, testified that in his long employment of over twenty years as engineer, he had never seen or heard of any rule, regulation, or bulletin order against traveling engineers and traveling firemen getting upon the running board while the engine was in motion. This was certainly some evidence against the accuracy and reliability of the memory of the witness Ransom.

Finney was employed by the railroad at the time Ransom claimed the first bulletin order was passed.

We say, therefore, that it is only a vague surmise as to whether there was any instruction and rule, and that the testimony of the interested witness who testified on the subject contained in it elements of improbability, was in conflict with the practice on the road, was in conflict with the evidence of other engineers as to there ever having been such rules or bulletin orders, and conflicted with the requirements of the traveling

fireman contained in the printed reports which he must sign at the end of each trip.

IF THE PETITIONER WAS NEGLIGENT IN RESPECT TO THE CONDITION OF ITS TRACK, AND THIS DEFECTIVE CONDITION OF TRACK CAUSED THE ENGINE TO LEAN DANGEROUSLY CLOSE TO THE BRIDGE, AND WAS ONE OF THE CAUSES OF THE DEATH OF HUGHES, EVEN IF THE JURY SHOULD FIND HUGHES GUILTY OF SOME NEGLIGENCE IN GETTING UPON THE RUNNING BOARD, THIS WOULD ONLY REDUCE THE RECOVERY AND NOT DEFEAT IT, AND THE VERDICT WAS CUT DOWN FROM $17,500 ON THE FIRST TRIAL TO $10,000 UPON THE SECOND TRIAL.

We call attention to the Act of Congress, which provides that contributory negligence shall not defeat a recovery upon the part of an employe, but that, in case of contributory negligence, damages shall be diminished in proportion to the amount of negligence attributable to the employe.

This court has held in cases too numerous to mention that the section of the Act as to the contributory negligence of the employe is operative; that it takes into account the sum total of the negligence which produced the injury; that the injured employe is chargeable with his proportion of it and that the railway company is chargeable with its proportion.

Contributory negligence is a distinct proposition from assumption of the risk.

As just stated, we have conceded that the doctrine of assumed risk applies under the Federal Employer's Liability Act; but

any mere negligence of the decedent in being out upon the engine at the wrong time, or even in violation of orders, or failing to keep a proper lookout, would be, under the Act of Congress, only contributory negligence, and would not bar recovery, but would only reduce the damages.

The decedent would not be held to have assumed the risk of the condition of the track here. In the case of Gila Valley &c. R. Co. vs. Hall, 232 U. S. p. 94, a railway employe was injured while riding on a three wheel gasoline car because of a defect in the wheel. The employe had been employed three or four days in that work riding on the car, and the court said, as there was no direct evidence that he knew of the defect, and as it was not part of his duty to inspect the machine or look after its condition, he was not chargeable with assumption of the risk. The court approved a charge in that case giving the law of assumed risk as follows:

> "The true test is not in the exercise of ordinary care to discover dangers by the employe, but whether the defect is known or plainly observable by him. An employe is not charged by law with the assumption of a risk arising out of defective appliances provided by his employer unless his employment was of such a nature as to bring to his attention and cause him to realize and comprehend the dangers incident to the use of such appliances."

In the case of Roberson vs. St. Louis Railway, 213 S. W. 873, a switchman whose death was sued for under the Federal Act, and it being impossible to say that as a matter of law he knew that a car protruded from a track for such a distance as to render it unsafe to attempt to pass between that car and a moving car on another track, held not to have assumed the risk of injury from being crushed between the cars, but at most guilty of contributory negligence diminishing damages. See the case of Roberson vs. St. Louis Railway, 213 S. W. 873.

In the case of Authement vs. Louisiana Western R. Co., reported in 86 Southern Reporter, 215, from Louisiana, headnote 3 reads thus:

> "Where a brakeman having switched a car on a siding, called the conductor's attention to the fact that it was too close to the other track, the conductor telling him to leave the car where it was, and on the following morning while riding on another car, without looking towards the stationary car, was brushed off, he did not assume the risk of injury from contact with the stationary car, though he forgot the danger and failed to guard against it, but he was guilty of contributory negligence within the Federal Employer's Liability Act, if his conduct was not justified by his duty to obey the orders of his superior."

On page 216 of this decision, in 86 Southern, the court says:

> "The doctrine of assumption of risk is not appropriate to this case. The plaintiff's forgetting the danger, or failing to guard against it, was not a deliberate assumption of risk. It was contributory negligence, if in fact it was not justified by the duty which the brakeman owed to obey the orders and act upon the judgment of his superior."

A strong case is the case of Anzolotti vs. McAdoo, 262 Fed. 568, from New York, in which a longshoreman was pushing sacks of flour down some skids on a truck across a pathway hidden by cotton bales on which other trucks going in a right angular direction were pushed. Oblivious of the danger of colliding with another truck, and forgetting it for the moment, he started at too high a speed and could not stop before getting into the track pursued by the other trucks, and collided with one of them. It was contended by the defendant that he had assumed the risk of another truck being on the other pathway. The United States District Court held that it was not a case of assumption of the risk, but that the collision occurred simply by his negligence in forgetting and in going down the pathway

too fast, and in not taking proper precautions to avoid the danger. The court, on page 570, said:

> "Further, I may assume that in order to establish an assumption of risk, the servant need not be faced with a choice between throwing up the work or losing all right of recovery. If a remedy for the danger is at hand, and he fails to use it, his inaction may be evidence of assumption. Yet, if the doctrine of contributory negligence is to remain at all, I think we must interpret language like that of Justice Day in 220 U. S. 590, as meaning that the precautions which the servant omits, when he contributes negligently to the injury, are choices required of him only in the discharge of the duties imposed upon him, and not precautions which call upon him to do something outside. At any rate, without attempting any exhaustive definition, it appears to be quite safe to say that when the injury arises from a failure to choose correctly between two ways of discharging those duties, one of which is safe and the other hazardous, the servant has not assumed the risk but has negligently contributed to the injury. This may not be the final line between the notions; but, if not, I believe it safely excludes all cases of assumption of risk, unless that idea is to absorb the other altogether."

The rules of a railroad company are construed most strictly against the company, and liberally in favor of the employe. See Western & Atlantic Railroad vs. Bussey, 95 Ga. 584, headnotes 2, 3, 4, 5 and 6.

Where a locomotive engineer was killed while operating his locomotive at high speed, imprudently, negligently, or even contrary to a rule of the road, for his governance, that fact did not bar him from recovery under the Federal Employer's Liability Act, but only went to mitigation of the damages. L. & N. R. R. vs. Fleming, 69 So. Rep. 125.

In the case of San Pedro, L. A. & S. L. R. Co. vs. Brown, 258 Fed. Rep. 806, it was held that, under the Federal Em-

ployer's Liability Act, the negligence of a car inspector of an interstate carrier, in failure to place a blue flag at the end of a string of cars before making an inspection, pursuant to a rule of the company, or his failure to have his co-worker, an inspector, to place such flag, was not such negligence as would bar a recovery, but was such as, if proven, would merely mitigate damages.

In the case of St. Louis, I. M. & S. Ry. Co. v. Conley, 187 Fed. Rep. 949, the plaintiff alleged that the railroad company had constructed a railroad tunnel through which its road extended; that near the center of the tunnel the railroad company carelessly and negligently erected and maintained upright posts of timber, known as "batter posts," so near and within such close proximity to the railroad track that they rendered the operation of its engines and trains over the track at such place hazardous, unsafe, and dangerous to its employes while in the discharge of their duty; that Conley was in the discharge of his duty as engineer of a freight train, and while the engine was passing the upright timbers, or "batter posts," he was struck upon his head by one of them, on account of the negligence and carelessness of the defendant railroad company, and by reason of the upright timbers being too close and within dangerous proximity to the track, and that he received injuries resulting in his death.

In the fourth paragraph of the decision, the court says:

> "It is said that Conley was familiar with the tunnel, and the testimony of a number of expert witnesses on the part of both the plaintiff and defendant tended to show that, because of the swaying motion of the engine running over a rough track, it was impossible to ascertain the distance structures were from the track with any degree of accuracy, even in the day time, and the conditions here were much less favorable. In addition to this, as shown

by the condition of the engine after coming out of the tunnel, an emergency had arisen which required the engineer's immediate attention."

In the case of Missouri, K. & T. Ry. Co. of Texas vs. Williams, 103 Tex. 228, 125 S. W. 881, affirming a Texas case in 117 S. W. 1043, the above case also being quoted in Neg. and Com. Cases, Vol. 14, page 20, the court holds (our quotation being from 14 Negl. & Compensation Cases, p, 20):

"In an action against a railroad company by the widow and children of an engineer killed by striking his head against the extended arm of a mail crane, as he was looking out of the cab window, in an ordinarily careful manner, to observe the working of the injector of the engine, the evidence tended to show that the longer arm of the crane, when lowered to the horizontal position in which it rested when holding a bag, extended to a point which left between its iron end and the cab of a passing freight engine, when the track was in good repair, a clearance of but 9¾ inches. There was testimony to the effect that the crane would have served its purpose equally well in a location somewhat further from the track. There was evidence also of a defective condition of the track at that point, in consequence of which the engine swayed an unusual distance, rendering the actual clearance a few inches less. It was not usual for the crane to be in use as freight trains passed, but on this occasion the passenger train for whose picking up the bag had been put in position, was late, and when the decedent's freight train pulled by, ahead of the overdue passenger train, the bag had not been removed. The negligence alleged in the complaint was (1) the maintaining of the crane too close to the track, and (2) the permitting of the defective condition of the track. In affirming the decision by the court of civil appeals, sustaining a judgment for plaintiffs for $25,000, the supreme court held, with respect to the crane, that the evidence was clearly sufficient to take the case to the jury upon the issue of the defendant's negligence causing the death. It having been urged in argument that without

evidence from experts in crane construction the jury could not competently have found that the crane was not constructed in a place and manner proper, or even necessary, to its use, the court held that if there was a reason hidden from the ordinary person why the crane should have been just where it was, the burden at the trial had rested upon the defendant to bring that reason before the jury, since in themselves the circumstances here indicated negligence sufficiently to raise a presumption thereof that placed on the defendant a burden of explanation. The Supreme Court said: 'The occurrence itself is sufficiently indicative of negligence on the defendant's part to call for an explanation from it, freeing it from such imputation. The killing of one of its employes while in the proper performance of his duty, by contact with a structure of its own contrivance near the track, strongly indicates a lack of proper care and foresight in the location of the structure, in view of the reasonable presumption that it could have been made consistent with the safety of employes while rendering the ordinary service.' A similar view was taken with reference to the defective condition of the track."

The case just quoted from Texas seems to be practically the case at bar in all particulars. There was a defective condition of the track which caused the engine to sway an unusual distance, rendering the actual clearance of the crane a less distance than it would have been had the engine not swayed. The negligence complained of in that case was, first, the maintenance of the crane too close to the track, and, secondly, *the permitting of the defective condition of the track.*

We also refer to the case of St. Louis &c. Ry. Co. vs. Conley, 187 Fed. 949, hereinbefore quoted, where there were batter posts close to the track, and where there was a rough track, which caused the engine to sway unusually, causing Conley to be stricken by one of the posts.

We thus have it established that merely to violate a rule is not ordinarily anything but contributory negligence. To be at the wrong place on an engine is ordinarily only contributory negligence. The courts have even held that, where a rule required a car inspector to put up a blue flag, that the failure to have the flag up is only contributory negligence. In all these cases, the employe can recover, if the defendant's negligence, in the language of the congressional enactment, in part caused the injury. That keeping in memory the close timbers of a bridge is a matter of ordinary prudence, and the failure to do so is only a matter of contributory negligence, see Authement vs. Louisiana Western R. Co., 86 So. 215; Anzolotti vs. McAdoo, 262 Fed. 568.

That violating a rule of a company goes only in mitigation of damages under the congressional enactment, see Louisville & N. R. Co. vs. Fleming, 69 So. 125; San Pedro &c. R. Co. vs. Brown, 258 Fed. 806.

All railroading is dangerous, and merely to be in a dangerous place, as on the foot board of an engine, is not necessarily negligence. See A. K. & N. R. R. vs. Tilson, 131 Ga. 401.

That the defects in the track were actionable as to Hughes, there can be no doubt. He was not required to inspect or keep up with the track; neither did he assume the risk of injury from the negligence of co-employes.

The act of Congress is very much like our Georgia law as to recovery for the negligence of co-employes, and it has been repeatedly held that an employe did not assume the risk of injury from the negligence of another employe. See the case of Southern Ry. vs. Davis, 15 Ga. App. 739.

In Atlanta Ry. vs. McManus, 1 Ga. App. 308, the court said:

> "The employe of a railway company does not assume the risk of injury from the negligence of his co-employes."

That, under the Act of Congress, an employe does not assume the risk of injury from negligence of a fellow servant, see the numerous cases cited on page 2759 of Vol. 3 of Annotations, 1923 Supplement of U. S. Compiled Statutes.

HUGHES WAS ONLY CONCERNED WITH THE MECHANICS OF THE ENGINE, HAD NO DUTY TO PERFORM IN RELATION TO THE TRACK, AND, IN THE ABSENCE OF EVIDENCE SHOWING THAT HE KNEW, OR MUST HAVE KNOWN, OF THE DEFECTIVE CONDITION OF THIS TRACK, COULD NOT BE CHARGED WITH ASSUMPTION OF THE RISK ON ACCOUNT THEREOF.

This decedent was under no duty to inspect the track. He could well assume that the track was kept in safe condition. Merely because he ran over it, he was not charged with such knowledge of it as the section foreman and track men were charged with. He used the track only in riding on the engine.

The case is very analogous in the underlying principles to that of Wilson vs. Atlanta, 63 Ga. 294, in which Judge Bleckley called attention to the fact that the duty on a city of maintaining a street in safe condition, though limited to ordinary diligence, was very different from the case of foot travelers using a street, who were likewise limited to ordinary diligence; that the same standard of care, though applicable to both, might make the city authorities negligent, while the foot traveler, not having the same duty of inspection, would not be negligent; that using a

street would not imply the same degree of foresight, care and knowledge as would the duty of keeping that street in a proper and safe condition.

Railroad employes do not assume the risk of injury from defective appliances. See Lloyd vs. Southern Ry. Co., 81 S. E., 1003; Sears vs. Atlantic Coast Line R. Co., 86 S. E. 176. Certainly the track comes under the same classification as defective appliances.

An employe does not assume the risk of injury from defendant's failure to properly maintain a lighting system in its yards. Kirbo vs. Southern Ry. Co., 84 S. E. 491.

A locomotive fireman is not chargeable with knowledge of the condition of the ties because he frequently rode over the track and occasionally walked over it. See the Wilson case, 212 Ill. App. 271.

Even where a structure by the side of a track was held to be such a fixed structure as to charge the engineer with assumption of the risk when his engine passed through it, the court was cautious enough to guard its language by saying:

> "and that the engine did not sway more than ordinarily."

See McDougall vs. Atchison &c. Ry. Co., 186 Pac. 1028.

No affirmative duty of inspection is required of a railroad employe to see whether there are defects in appliances. See Chicago &c Ry. Co. vs. Payne, 217 S. W. 810.

The employe may assume that the employer has exercised ordinary care in providing a safe place to work and suitable appliances. Ft. Worth &c Ry. Co. vs. Smithers, 228 S. W. 637.

That engineers, firemen and train hands injured because of defective conditions of track can ordinarily recover, and ordinarily do not assume the risk of such condition, is held in numerous cases, among them the following: Shugart vs. A. K. & N., 133 Fed. 505; Galveston, etc. vs. Thompson, 116 S. W. 106; Jones vs. Wilson, 79 S. C. 69; Lincoln vs. Central, etc. R. R., 82 Vt. 187.

That a casualty occurring from a defective track is not one of the ordinary perils which an engineer voluntarily assumes in taking service with the company is held in Baltimore, etc. R. R. vs. Taylor, 186 Fed. 828.

On the general subject that engineers, firemen and train hands do not ordinarily assume the risk of defects existing in the rails and ties of the track over which they run, see the case of Smith vs. Chicago, etc. R. R., 82 Kan. 136, and the elaborate note to this case in 28 LRA N. S. p. 1255, in which scores of cases hold that the trainmen do not assume the risk of defective tracks, and the cream of the doctrine is thus stated in this note in 28 LRA N. S. on page 1256 as follows:

> "The general rule asserted by practically all of the cases cited below, and not repudiated by any, is that a trainman has a right to assume that the track and road bed are safe; that it is not his duty to make an investigation in order to discover defects, and, in the absence of any knowledge, actual or constructive, of the defects, he will not be held to have assumed the risk thereof;"

and scores of cases hold that knowledge of defects in the road bed is not inferable from the mere fact that the servant runs trains over them, and we quote from this note as follows:

> "The risk of injury from a defect in a track, negligently permitted to remain unrepaired, is not one of the risks of the services assumed by a conductor (citing cases), and

a knowledge of defects in a road bed is not inferable from the mere fact that the servant had been accustomed to running trains over it."

RECOVERY IN THIS CASE WAS BASED UPON NEGLIGENCE AS TO CONDITION OF TRACK; JUDGE CHARGED JURY FULLY ELIMINATING CLOSENESS OF BRIDGE ALONE AS AN ACTIONABLE DEFECT. JUDGE CHARGED JURY FULLY ON ASSUMPTION OF RISK AS TO ALL PHASES OF THE CASE.

The recovery in this case was based upon the condition of the track, and that condition was shown by witnesses to have been defective, both before this injury and immediately after.

That defect in the track consisted in low joints at two places within a few feet of the entrance to this bridge, which caused an engine to rock unduly. Trainmen are not charged with knowledge of the condition of the track, unless it is brought home to them in some way, and it is not assumption of the risk as to them unless trainmen either knew it or, in the exercise of ordinary care, should have been charged with knowledge of it; and the judge in the court below charged fully upon the doctrine of assumption of the risk. See the charge of the court on pages 153 and 154, in which the judge used the following language:

> "This act further provides that in all actions brought against any railroad under any of the provisions of this act to recover damages for the death of an employe, the fact that the employe may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe.

"The court instructs you that there are certain risks of an employment which an employe assumes in entering the employment, and if the injury results from some of these assumed risks, then there is no liability for such injury on the part of the employer. An employe assumes the risks of such dangers as are normally and necessarily incident to the occupation, whether he is aware of them or not. A risk of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work or suitable and safe appliances for the work. These the employe is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless the defect and risk alike are so obvious that an ordinarily prudent person, under the circumstances, would have observed and recognized them.

"An employe does not, however, assume the risk of conditions of which he is not aware, or of which in the exercise of ordinary care, he could not have discovered.

"The court instructs you that the fact of an accident to an employe carries with it no presumption of negligence; and it is an affirmative fact for the plaintiff to establish that the employer has been guilty of the negligence as alleged. It is not sufficient for the plaintiff to show that the defendant may have been guilty of such negligence; the evidence must point to the fact that it was; and where the testimony leaves the matter uncertain it is not for the jury to guess as to the existence of such negligence and find that the negligence of the defendant was the real cause of the disaster if there is no satisfactory foundation for such conclusion. On that question, gentlemen, you will apply the rule of the greater weight of preponderance of the evidence, as I have previously defined it to you, and on all questions of fact you will apply that rule of the greater weight of preponderance of the evidence."

The judge was clear in telling the jury, as matter of law, that the decedent assumed the risk from the bridge, in the

following language on page 154, as well as in the language hereinbefore quoted, to-wit:

> "The court instructs you that, so far as the bridge alone is concerned, it was a fixed structure upon the defendant's line of track, and that the decedent would have assumed the risk of any injury which was due to the bridge alone.
>
> "The court instructs you that it is not sufficient to relieve a servant from assumption of risk as to the proximity of permanent structures on his master's premises that he may not actually know the distance of such structures from the place where he is accustomed to work. If such a structure, or portions thereof, as for instance a railroad bridge, within the observation of a man of ordinary care, is so near to the side of an engine passing into the bridge, which engine is itself no wider than those on which the servant has been accustomed to pass through the bridge, as to make it unsafe for him to be with his body or portion thereof extending beyond the outer edge of the engine, then the servant assumes the risk of being so, though he, himself, may not actually know the width of the bridge or the distance of such portion of the bridge from the engine or track. He not only must not actually know but he is chargeable with a knowledge of the peril if plainly observable."

The judge left it to the jury as to whether the decedent was or was not negligent in knowing of the defective part of the track, and we submit that this was a jury question. There was not a particle of proof that the decedent knew of the defective condition of the track, or should have known of it. Inspection of the track was not part of his duty. It was not even his duty to run the engine, for that belonged to the engineer. His duty only pertained to inspection of the mechanism of the engine, to-wit, keeping it hot. On this subject, the judge charged the jury as follows (See Record pp. 154, 155):

> "The court instructs you that if the defendant was negligent in respect to the condition of its track, and

if you find that the decedent was not chargeable with negligence in not knowing the condition of the defendant's track, if it was a defective and dangerous condition, and if you find that the defective condition of the track, being negligence as just stated, caused the engine to rock or tilt from side to side, as alleged in the petition, and if you find that this condition of the track causing this rocking or tilting of the engine was the cause of the decedent coming in contact with the timbers of the bridge, as alleged in the petition, or was the cause of the decedent being thrown from the running board of the engine, as alleged in another count of the petition, and if the plaintiff's negligence, if he was negligent, was not the sole and only cause of his death, then and in such event the plaintiff would be entitled to recover in this case.

"You are instructed that under the Act of Congress it was the duty of the defendant to exercise ordinary care to keep its track and road bed in proper condition and that if, because of any defect or insufficiency due to the defendant's negligence in its tracks or road bed, any employe is killed, that then the personal representative of such employe may maintain an action and recover such damages as, under the law, might be assessed under instructions to be hereafter given you."

THE PETITION FOR CERTIORARI CLAIMS THAT PLAINTIFF AND HER WITNESSES AS TO THE CONDITION OF TRACK ARE NOT EXPERTS; OUR REPLY IS THAT PLAINTIFF AND HER WITNESSES WHO TESTIFIED AS TO THE CONDITION OF TRACK TESTIFIED TO FACTS WHICH ANY LAYMAN COULD SEE AND OBSERVE; TESTIFIED AS TO ACTUAL PHYSICAL EFFECT OF DEFECTIVE JOINTS IN TRACK AS MAKING ENGINES SWAY AND ROCK WHICH DID NOT SWAY OR ROCK BEFORE; TESTIFIED TO ACTUAL

NEARNESS OF ENGINE IN ITS SWAYING MOTION TO SIDES OF BRIDGE; AND THAT BASED UPON SUCH TESTIMONY, DEFENDANT'S EXPERT MASTER MECHANIC ADMITTED THE CONDITION WAS DANGEROUS.

In the argument for defendant in error, beginning on page 19, it is claimed that the evidence of plaintiff and her witnesses who testified that the track gave from three to four and five inches and that the engine actually rocked until it came within a few inches of the side of the bridge on entering the same, is not entitled to weight, because the plaintiff and the other witnesses were not experts, and that tracks are supposed to give some.

In the first place, we say that the plaintiff and these witnesses did not testify to conclusions, but testified to facts. We have already quoted their testimony showing that there were two low joints in this track and that when the train struck the joints the track gave and the train began to rock.

The plaintiff testified, in addition to what we have quoted hereinbefore from her other witnesses, on page 52 of the Record as follows:

> "I observed the effect that the engine had as it went over that crossing at that place; it gave down; I saw that. The track gave down at that point 4 or 5 inches. The effect it had on the locomotive of that train was that it started it to rocking. I had not observed it rocking before that. I observed another low place just before you get to the bridge on the left hand side coming to Atlanta, and I observed the train as it hit it and observed it knocking the water and mud from under the track; it knocked the mud out and the ballast was all gone from

> this low place, all washed down, you know, under the ties. The ballast was worn out and it knocked the mud and water from under that place. After the engine, in approaching that bridge, struck these low places in the track it had a rocking motion; I could see it rock. That bridge has upright pieces and it looked to me like the engine, in its rocking motion, came awfully close to the side pieces of that bridge; I would say about 6 or 8 inches; that would be my judgment."

So plaintiff and her witnesses were not testifying to conclusions, but were testifying to things which they saw. This witness saw the engine approach these low places, and did not observe it rocking or swaying. When it struck these low places, it began to rock and the rocking motion continued as it entered the bridge, making the cab of the engine come dangerously close to the side of the bridge.

Certainly, a lay witness can testify to facts. It may be conceded that there is some slight give to a track at a joint, perhaps a quarter or a half inch, but no one will contend that for a track to give all the way from two to five inches is slight, and no one can contend that a low joint which causes an engine to rock when it did not rock before, and which causes it to rock so that it comes within something like six inches of the sides of a bridge, when normally it ought to clear it over two feet, is doing the usual and normal thing for an engine on normal and proper track. The expert evidence all tends to show that if the facts testified to by these lay witnesses were true, the track was in bad condition. The engineer, Finney, who had had long experience, on page 69 of the Record testified:

> "As to the effect of a low joint in the track, where there is mud under it, where it is soft, where the tie gives, it causes the engine to rock from side to side, each way. I have had that experience many a time; I have been derailed several times from that effect, I thought that was

> the cause. As to what extent should a low joint make an engine rock, it is according to how bad the shock is; the greater the shock, the more danger. I think it will make a larger engine rock more than a smaller one. The greatest part of the rocking is at the top."

That a track, which gave way as much as the defendant's track was shown to have given by the witnesses we have quoted, was in an extremely dangerous condition is shown by the defendant's expert and master mechanic, Ransom, who on pages 128 and 129 testified as follows:

> "The effect on an engine running along, if the track should give away on one side with the engine on it from four to five inches and some 30 or 40 feet further on on the other side should give away from four to five inches, just before entering a bridge, that bridge would have to be pretty wide if you got through it. Only a miracle would keep it from being derailed."

Again, on page 129 of the Record, Ransom, the defendant's master mechanic and expert, testified as follows:

> "Yes, the rougher the track the more it is liable to rock. As to there being a great deal more rocking on these rough side tracks that are not as well ballasted as the main line, if you get up the same speed they will, but the speed is very low. There is a principle on which you can figure, if a car body is let down one, two or three inches, as to how much that would project over. The rule is about three to one; that is my recollection of it. Yes, the effort in making these vehicles is to try to overcome that as much as possible. No, you would not want a track with a low joint in it."

Thus, we see that with an object as high as a car or the cab of an engine, if the body of the engine is let down one, two or three inches, the top would project over about three times that much. Of course, the projection over is dependent, first, upon

the depth of the depression and the height of the object supposed to project over. Thus, if there were a five inch give, there would be a fifteen inch projection over on one side at the top. If there were a four inch depression, there would be a foot projection over at the top, etc.

The argument lays stress on the fact that Kemp, the fireman on this engine, was the plaintiff's chief witness. We deny this. He was only the plaintiff's witness from the necessity of having to put him up to prove the circumstances surrounding the killing.

The argument claims that all of the experts swore that the track was in perfect condition. We deny this. We say that the defendant's experts giving an opinion based upon the evidence of the plaintiff's witnesses showed that this track was dangerous, as we have just shown.

On page 20 of the brief, the defendant claims that there is only a scintilla of evidence for the plaintiff. We think we have shown that numerous witnesses testified to actual facts showing a bad condition of the track and showing the actual physical effect of that track on trains, and that the defendant's experts testified that if these facts were true, the track was in bad condition.

It is not to be presumed that the plaintiff, in cases of this sort, can make witnesses of the defendant's track men who are charged with responsibility for keeping up the track. Naturally, employes charged with this duty would make every effort to exonerate themselves. At least, their interest is always for the consideration of the jury, and a jury is not bound to take the opinions of track men as to the condition of the track against witnesses testifying to actual facts, and against photographs, and against the actual physical effect of that track on trains.

Under heading (b) on page 20 of the brief, the defendant claims that the plaintiff's case is made out by the guess of novices on technical matters against the judgment of informed experts, and it is claimed that all the experts, the men who actually built and inspected the track, agreed that it was in perfect condition.

These experts conflicted with the plaintiff's testimony. The credibility of these experts, under these circumstances, was for the jury. This is no question of the case of a novice, as the defendant's brief claims. It is the case of the testimony of several witnesses as to absolute facts, visible to the eye, and as to the actual effect of the condition of a track on trains which passed there.

AS TO CLAIM THAT VERDICT SHOULD HAVE BEEN DIRECTED FOR DEFENDANT, WE SAY THAT IN THE FEDERAL AS WELL AS IN THE STATE COURTS, UNDER THIS EVIDENCE, THE CASE WAS FOR THE JURY; AT THE SAME TIME, ALL THE RULES OF PRACTICE IN FEDERAL COURT CAN NOT BE TRANSPLANTED TO THE STATE COURT MERELY BECAUSE A RIGHT ARISING UNDER A FEDERAL STATUTE IS ASSERTED.

Under heading (c) in the brief on page 21 counsel for defendant contend that a verdict should have been directed for the railroad, and take the position that even in state courts, under the Federal Employer's Liability Act, a verdict should be directed not in accordance with state practice, but in accordance with the Federal rule.

We respectfully contend that in the Federal courts, as well as in the State courts, the trial judge would have had to

submit this case to the jury upon the condition of this track, and upon whether these witnesses who testified to the facts in connection with it, corroborated by the photographs, were testifying to the truth. That their testimony conflicted with certain expert witnesses can make no difference. As we have hereinbefore shown, the defendant's expert, Ransom basing his opinion on the facts testified to by the plaintiff's witnesses, characterized the track as being in a condition likely to even derail a train.

We do not understand that when a plaintiff brings a case in the state court under the Federal Employer's Liability Act that the rules of practice of the Federal court govern.

Where the state law forbids it, a state judge could not express his opinion on the facts in a case under this act.

Pleadings are drawn and the jury are stricken under the rules of procedure in the state court.

It is impossible to transplant all the rules of practice into the state court from the Federal court, just because the right of action is governed by a Federal statute. The trial, the weight to be given the testimony, the functions of judge and jury are all matters which pertain to the remedy, and in all matters relating to the remedy the law which created the trial court governs, and not the other laws of the jurisdiction which give the right.

The case of Gulf &c. Ry. vs. Wells, 48 Supreme Court Rep. 151 (72 L. ed. 152) quoted by petitioner, merely held that where a brakeman attempting to get on a train after it had started testified that the engine gave an unusual jerk, when he was ten cars away from the engine, could not establish negligence, where the engineer did not know that the brakeman was

attempting to get on the train after it had started, and where the brakeman's statement was necessarily a mere conjecture arising from the fact that he could not see what occurred on the engine, and that his opinion was not of sufficient weight to carry the matter to the jury.

This case goes very far from holding that the trial judge in a state court must adopt all the rules applicable in the Federal trial courts in cases under the Federal Employer's Liability Act.

The case of Chicago &c R. R. vs. Coogan, 271 U. S. 472, merely holds that it is the duty of the trial judge to direct a verdict for one of the parties where the testimony "and all the inferences which the jury may reasonably draw therefrom would be insufficient to support a different finding."

This is the rule in Georgia and everywhere else, so far as we know. It is not a rule peculiarly applicable to the Federal courts.

The Code of Georgia, section 5926, provides as follows:

> "Where there is no conflict in the evidence, and that introduced with all reasonable deductions or inferences therefrom demands a particular verdict, the court may direct the jury to find for the party entitled thereto."

We do not understand that this rule is, in any material way, different from the Federal rule.

True, in the Federal courts, the judge may express his opinion on the facts, while in Georgia and most of the other States, he can not do so.

The case cited of Small Co. vs. Lamborn, 267 U. S. 248, was a case from a district court of the United States.

The case of Barrett vs. Virginian Ry., 250 U. S. 473, was likewise a case carried up from a district court of the United States.

The case of Central Vermont Ry. vs. White, 238 U. S. 507, merely holds that the question of the burden of proof respecting contributory negligence in a suit in a state court under the Federal Employer's Liability Act is to be determined according to the rules in the Federal courts, which placed the burden on the defendants, and not according to any local rule of procedure which imposes that burden on the plaintiff. That question is in no way involved in this case. There are certain rules of the state court which, of course, do not apply in cases under the Federal Employer's Liability Act. In Georgia, there is a presumption against a railway company where a person is injured by the running of trains, which in certain instances, where freedom from fault appears, applies to employes. Of course, this rule does not apply to cases in the state court under the Federal Employer's Liability Act, and the judge below, in his charge, was careful to tell the jury that the burden of proof was on the plaintiff to make out her case by a preponderance of the testimony (See Record p. 150).

PETITION FOR CERTIORARI CLAIMS THAT EVIDENCE SHOULD HAVE BEEN INTRODUCED SHOWING JURY METHOD OF REDUCING PAYMENTS TO PRESENT CASH VALUE AND THAT PREVAILING INTEREST RATES SHOULD HAVE BEEN SHOWN BY EVIDENCE. AS MATTER OF FACT, PLAINTIFF INTRODUCED THE CARLISLE MORTALITY TABLE SHOWING EXPECTANCY OF LIVES, AND DEFENDANT INTRODUCED THE ANNUITY TABLE SHOWING VALUE OF ANNUI-

TIES OF $1.00 AT INTEREST RATES OF 6% AND 7%, WHICH, UNDER DECISION IN CHESAPEAKE & OHIO VS. KELLY, 241 U. S. 485, IS ONE OF THE METHODS OF PROVING HOW TO REDUCE SUM TO PRESENT VALUE.

The claim is made in the petition for certiorari on pages 16, 18 and 24 that evidence should have been introduced showing the jury how to make a mathematical calculation by which future payments may be reduced to their present cash value, and that there should also have been some evidence on the actual rate of interest on money.

The facts do not bear out this contention. The plaintiff introduced (after showing the earnings and value of services of decedent and his age and health and strength, as hereinbefore stated) the Carlisle Mortality Table, which showed a person of the decedent's age, thirty-four, to have an expectancy in life of 31.68, and which also showed the expectancy of the wife and son at their proved ages (Record p. 138).

The defendant introduced the Carlisle Annuity Table showing the value of annuities of $1.00 on single lives according to the Carlisle Mortality Table, and the defendant, in introducing that table, selected two rates of interest, to-wit, the 6% and the 7% rates (See Record pp. 139, 140 and 141).

According to the Kelly decision, supra, and the current of authorities, the prevailing way of proving (if it is considered necessary to prove, which we deny) the process of reducing a sum to the present cash value is to introduce these annuity tables at given ages and at given rates of interest. See also Florida &c. R. R. vs. Burney, 98 Ga. p. 1.

The defendant, by selecting and putting before the jury the 6% and the 7% rates of interest, certainly must be considered in the attitude of claiming that those rates of interest are applicable and that the jury would be authorized to use one or the other of them. Moreover, 7% is the legal rate of interest in Georgia, and, under Georgia decisions as to cases arising under Georgia law, the 7% or legal rate is used in making this discount. See Florida &c. R. R. vs. Burney, 98 Ga. 1.

But, as has been held by this court in the Kelly case, supra, the legal rate in the State is not necessarily the rate of discount. The trial judge recognized fully that the legal rate in the State was not the rate to bind the jury, and he left the rate of interest to the jury, under proper instructions.

The judge told the jury in his charge on pages 161 and 162:

> "When you decide upon the amount of the pecuniary benefits which the decedent's life would have been to his wife and also to his child, under the conditions heretofore stated, if any, it would not be proper to give the gross amount of these benefits in the verdict which you would render in this case, because, in as much as the sum is paid down all in cash, the amount would have to be reduced to its present cash value.
>
> "You are instructed that the present cash value of the future benefits of which the beneficiaries were deprived by the death of the decedent, making adequate allowances according to the circumstances for the earning power of money, is the proper measure of damages in an action of this character.
>
> "It is a question for you to decide, under all of the circumstances of the case and under all conditions which might be present, as to what rate of interest you would use in making a discount of the future value of the decedent's life to his wife and child to its present cash value. Local conditions are not to be disregarded, nor should the dis-

count necessarily be at what is called the legal rate of interest. It is a matter for the jury to decide as to what the earning power of money at this place, and at this time, and under all the conditions which are here present, would be.

"You are authorized to make the calculations reducing these sums found by you, if any, to their present value by any proper mathematical calculation. In other words, whatever the annual loss of these beneficiaries might be throughout the expectancy of the decedent, or throughout such part of his expectancy as you decide that these beneficiaries should receive the benefits—the sum would be reduced to its present cash value upon the rate of interest which you fix as reasonable, just and right under all of the circumstances."

Of course the jury, in making their proper mathematical calculation, could use the annuity tables introduced, if they adopted those rates of interest, and these annuity tables were introduced by the defendant. In Georgia, as we shall hereinafter show, even had no tables been introduced in evidence, it is the practice in that State to presume that the jury can make a calculation reducing a sum to its present cash value, just as they could multiply, add, subtract, or divide. The calculation is only a little more advanced one, and it is no violent presumption that any average jury could make it.

Suppose we take the decedent's contributions to wife and child at the low and conservative figure of $1,200 per annum. The Carlisle Annuity Table introduced by the petitioner in certiorari (defendant below), under the 6% column, shows that an annuity of $1.00 in favor of a man thirty-four years of age is worth 12.675, and, on the basis of 7% (which is the legal rate in Georgia) is worth 11.374. Thus, the exact method of reducing to present value was before the jury, at least to the extent of the rates of interest introduced before the jury by

the defendant. Thus, taking the contributions to the next of kin to be $1,200 a year, and multiplying by the figure under the 6% column, we get considerably more than the verdict found, to-wit, $15,210.00, while the verdict was for only $10,000.00. If we use the 7% table introduced by the defendant, it would still make the verdict more than the amount found by the jury. The defendant, by introducing this method of calculation as to both 6% and 7%, certainly must be placed in the attitude of contending that these rates of interest could properly be used by the jury in reducing to their present cash value.

BUT EVEN HAD THERE BEEN NO PROOF AS TO THE METHOD OF REDUCING FUTURE PAYMENTS TO PRESENT WORTH, AND EVEN HAD THERE BEEN NO EVIDENCE AS TO PREVAILING RATES OF INTEREST, THIS CALCULATION AND THESE RATES ARE MATTERS OF COMMON KNOWLEDGE, AS TO WHICH NO PROOF IS NEEDED, AND THE COURT COULD HAVE PROPERLY LEFT THEM TO THE JURY WITHOUT ANY PROOF WHATEVER. MOREOVER, THE QUESTIONS ARE NOT PROPERLY MADE IN THIS CASE.

We do not think that such questions as to present worth calculations and interest rates have been made in this Record. The practice in Georgia is to make the specifications of error in the motion for new trial, and the case goes to the appellate courts on those specifications. The claims made on page 32 and ending on page 35 of the Record do not, we contend, make any such claims as are argued in the brief, except in the most vague and general way.

There was plenty of evidence to authorize the jury to find the value of Hughes' life to the beneficiaries, who were wife and

child. The amount of earnings which Hughes received was shown by the testimony (See Record p. 50). The amount which Hughes contributed to his wife and child and the services which he rendered them were fully shown (Record pp. 50 and 51).

The judge charged fully the correct rule as to damages, charging the jury that the measure of damages was the financial benefit in a pecuniary way to the widow and child which would probably have resulted from the continued life of the decedent had he lived. The judge went fully into the subject, and consumed pages 160, 161, 162 and part of 163 of the Record upon the subject. He charged upon the mortality tables. He told the jury that it was finally upon them to fix the expectancy in life of the various parties. He charged fully that when the jury decided upon the amount of the pecuniary benefit which the decedent's life would have been worth to the wife and child, that it would not be proper to give the gross amount of these benefits, but the sum would have to be reduced to its present cash value (Record pp. 161 and 162). He charged that the present cash value of future benefits of which the beneficiaries were deprived by the death of the decedent, making adequate allowances according to the circumstances for the earning power of money, was the proper measure of damages. He told the jury that in deciding, under all the circumstances and under all conditions which might be present, as to what rate of interest the jury would use in making a discount of the future value of decedent's life, that local conditions were not to be disregarded, nor should the discount necessarily be at what is called the legal rate of interest, and that the jury were authorized to make the calculations reducing these sums to their present value by any proper mathematical calculation. He told the jury that in estimating earnings of a man, they should take all these things into consideration: feebleness of health, actual sickness, the loss of employment, reduction in wages and all other things for which a proper allowance might be made (Record p. 162).

In Chesapeake & Ohio vs. Kelly, 241 U. S. on pp. 490 and 491, the Supreme Court held that the discount should not be necessarily made at what is called the legal rate, and that the award should be made upon a basis that did not call on the beneficiaries to exercise skill and financial experience. The court went ahead in that case and said it was not called on to lay down any precise rule or formula, and the court was aware that it might be a difficult proposition for the ordinary juryman to calculate the rate upon deferred payments, with annual rests, and reach a present cash value, and did not decide how the question should be met further than saying:

> "Like other questions of procedure and evidence, it is to be determined according to the law of the forum."

This language is on page 491.

The law of the forum was decided by the Court of Appeals of Georgia and the Supreme Court of Georgia in this very case, and that law is that it is left to the jury, as the judge did in this case.

We do not agree that there is any difficulty in this proposition for the average juryman. In this day of intelligence and commerce, nearly any ordinary business man can make a reduction of this sort. It is only a little more advanced calculation than addition, multiplication, division, the calculation of interest, or the like, and all such questions which are considered to pertain to the ordinary knowledge of the citizen are left to the jury. So we say that the Kelly case, decided in 241 U. S. 485, and quoted on p. 25 of petitioner's brief, not only does not sustain the petitioner, but leaves the matter to the law of the forum.

The other case cited by opposing counsel, to-wit: the case of Gulf &c. Ry. vs. Moser, 48 S. Ct. 49, 72 L. ed. 64, does not

sustain the contention of counsel, the court merely holding in that case, as appears from headnote number 1 of the decision as published in 72 L. ed. p. 64, as follows:

> "In awarding damages for death under the Federal Employer's Liability Act, the jury must determine the present value of the pecuniary loss calculated as bearing interest at the highest net rate that can be had on money safely invested."

So this decision seems to hold squarely that the jury must determine the present value. The judge below so charged the jury, and told the jury that it was a matter for them to decide as to what the earning power of money at this place and at this time and under all the conditions here present would be.

In the case of Chesapeake & Ohio R. R. Co. vs. DeAtley, reported in 241 U. S. p. 310, the court on page 317 said:

> "Although the present action was based upon a Federal statute, it was triable and tried in a state court; hence local rules of practice and procedure were applicable. Central Vermont R. Co. v. White, 238 U. S. 507, 511, 59 L. ed. 1433, 1436, 35 Sup. Ct. Rep. 865, 9 N. C. C. A. 265; Minneapolis & St. L. R. Co. vs. Bombolis, No. 478, this day decided (241 U. S. 211, ante, 961, 36 Sup. Ct. Rep. 595)."

The general rule only is that the court must instruct the jury as to what the words "present worth" or "present value" are, and this the judge in the case at bar did. He instructed the jury fully on page 162 that the present cash value of future benefits of which the beneficiaries were deprived was the proper measure of damages, and that the jury were authorized to make the calculations reducing these sums to their present value; that whatever the annual loss of these beneficiaries might be, throughout the expectancy of the decedent or throughout such part of his expectancy as the beneficiaries are found to have

received the benefits, the sum would be reduced to its present cash value on the rate of interest which the jury fixed under the instructions given. There is no complaint made as to the adequacy of these instructions.

We contend there is no rule in Georgia requiring either evidence as to the rate of interest or as to the method of reducing a sum to its present value. Moreover, we say no such question is made in the Record, and no such question was passed on by the Court of Appeals, as see its opinion pp. 164 through 168 of the Record. The only proposition which at all touches upon the subject in the decision of the Georgia Court of Appeals is headnote 10 of page 168, reading as follows, to-wit:

> "10. Where, in the trial of a case under the Federal employer's liability act, the court charged the jury, with reference to reducing to a present cash valuation a sum representing damages for loss of future benefits, that in making such reduction the jury should make an 'adequate allowance, according to the circumstances, for the earning power of money,' and that it should 'be reduced to its present cash value upon a rate of interest which you fix as reasonable, just, and right under all the circumstances,' the charge stated a correct rule of law; and in the absence of a special request for a more specific charge, a failure of the court to charge that the jury, in making such reduction, should take into consideration the earning power of money when invested with ordinary care, was not error."

The practice in Georgia is not to prove before the jury the mere methods of mathematical calculation in ordinary matters, but to leave the same to the jury. The Supreme Court of Georgia, in L. & N. R. R. vs. Trout, 141 Ga. p. 121, used the following language, through presiding Justice Evins, on p. 123:

> "2. Complaint is also made that the court omitted to give in charge to the jury the mathematical process of reducing a sum payable at a future time to its present worth.

> Jurors are selected from the enlightened and intelligent citizens of the community, and there is no presumption of their inability to solve a mathematical problem of this kind. If a party is distrustful of a jury's ability in this regard, a timely written request, accurately stating the rule, should be made."

Thus, we see that under our practice, if more detailed instructions are desired than were given by the judge on the method of reducing future sums payable in installments to their present cash value, then a request so to charge should have been given; but it will be seen that Judge Pomeroy went as fully into this matter as a judge need go, certainly under the Georgia practice.

There was no requested instruction to the effect that the allowable rate of interest must be proved and must appear from the evidence in the case.

In the case of Louisville &c. R. R. vs. Holloway, 246 U. S. p. 525, the court instructed the jury that the damages recoverable by a widow under the Federal Employer's Liability Act for the death of her husband were such as would fairly and reasonably compensate her for the loss of pecuniary benefits she might reasonably have received but for her husband's death (and this language was substantially given to the jury in the case at bar, as see the charge of the court on p. 160 of the Record).

In the Holloway case just quoted, it was held that the railroad was not denied the benefit of the rule that financial future benefits should be reduced to their present cash value by an instruction that the damages should fairly and reasonably compensate the widow for the loss of pecuniary benefits which she might reasonably have received but for the husband's death, and it was held that if any further instruction was desired than

that given, it should have been requested, and that a requested instruction which erroneously limited the jury to the legal rate of interest in making the discount was properly refused.

But, as hereinbefore stated, the question is not really involved as to whether proof should be made before a jury of the method by which sums may be reduced to their present cash value, or the rates of interest, for all this was fully done by the introduction of both the Carlisle Mortality Table and the Carlisle Annuity Table at two rates of interest, the annuity table with the two rates of interest having been introduced by the defendant.

Respectfully submitted,

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